

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-264

In re Applications of

FRANK B. DUROSS File No. BPH-920512MC
(hereafter "DuRoss")

NEW HORIZONS File No. BPH-920513MF
BROADCASTING
PARTNERSHIP
(hereafter "New Horizons")

KENNETH F. ROSER, JR. File No. BPH-920513MI
(hereafter "Roser")

KEVIN O'KANE File No. BPH-920514MK
(hereafter "O'Kane")

For Construction Permit
for a New FM Station on Channel 250A
in Whitesboro, New York

HEARING DESIGNATION ORDER

Adopted: September 1, 1993; Released: October 18, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.¹

2. *New Horizons*. New Horizons proposes to side-mount its antenna on the existing tower WKGW, Utica, NY. This tower is listed in the Commission's official record as being located at coordinates 43° 03' 27" NL, 75° 25' 04" WL, the same coordinates listed in Item 2, Section V-B of New Horizons' Form 301 application. However, the coordinates plotted on the transmitter site map (printed on the map as "Radio Station WRUN") are 43° 03' 23" NL, 75° 25' 02" WL. Because New Horizons proposes to locate its antenna on an existing tower contained in the Commission's official records, this discrepancy is neither a tender nor an acceptance defect and may be rectified by amendment. Accordingly, New Horizons is required to submit a clarifying amendment to the Administrative Law Judge within 30 days of the release of this Order.

3. Lori J. Leppert and Michael J. Johnson, general partners of New Horizons, have indicated their intent to terminate their relationship with station WKGW(FM), Utica,

FCC MAIL SECTION

OCT 18 5 20 PM '93

DISPATCHED

New York in the event of grant of the referenced application. Accordingly, in the event of grant of New Horizon's application both partners will be required to sever all connections with WKGW(FM) prior to the commencement of program test authority.

4. On June 26, 1993, Roser petitioned for leave to amend his application. The subject amendment was filed without an original signature by Roser, as required by 47 C.F.R. § 73.3513, but was in fact signed only by Roser's counsel. Accordingly, the amendment will be returned.

5. In Section V-B, Item 7 of the Form 301 and on the tower sketch, O'Kane lists the height above mean sea level for this 159 foot (48 meter) tower as 414 meters. However, the Commission's records for this tower show heights of 159 feet (48 meters) above ground level and 417 meters above mean sea level. Because O'Kane proposes to locate on an existing tower contained in the Commission's official records, the above mean sea level height discrepancy is neither a tender nor an acceptance defect and may be rectified by amendment. Accordingly, O'Kane must submit a clarifying amendment to the Administrative Law Judge within 30 days of the release of this Order to resolve this discrepancy.

6. O'Kane has failed to comply with the worker-safety provision of OST Bulletin No. 65, October 1985, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," as it failed to indicate how workers engaged in maintenance and repair on its tower would be protected from exposure to radiofrequency ("RF") radiation levels exceeding the ANSI guidelines. *Id.*, at 28. Grant of his application will therefore contain the following condition:

The permittee/licensee must reduce power or cease operation as necessary to protect persons having access to the site, tower, or antenna from radiofrequency radiation in excess of FCC guidelines.²

7. O'Kane is 37.5% owner, President and General Manager of Mohawk Valley Broadcasting Inc., licensee of station WFXV(TV), Utica, New York. O'Kane has indicated his intent to terminate his relationship with station WFXV(TV) in the event of grant of his application. Accordingly, in the event of grant of O'Kane's application, he will be required to sever all connections with station WFXV(TV) prior to the commencement of program test authority.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent order, upon the following issues:

¹ On February 19, 1993, the application of William H. Walker, III (File No. BPH-920513ME) was dismissed for failure to pay the hearing fee, pursuant to 47 C.F.R. § 73.3573(g)(2) of the Commission's Rules.

² While the other applicants here have adequately addressed the worker-safety issue, grant of any of their applications will contain a similar condition.

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That in the event of grant of New Horizon's application, Lori J. Leppert and Michael J. Johnson shall divest themselves of any interest in and sever all connections with station WKGW(FM), Utica, New York, prior to the commencement of program test authority.

11. IT IS FURTHER ORDERED, That the June 26, 1993 amendment filed by Roser IS HEREBY RETURNED.

12. IT IS FURTHER ORDERED, That New Horizons and O'Kane are required to submit amendments correcting the discrepancies respectively detailed in paragraphs 2 and 5 above to the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That in accordance with paragraph 6 above, any construction permit issued in this proceeding shall contain the appropriate condition regarding protection of workers and others with authorized access to the site, tower, or antenna.

14. IT IS FURTHER ORDERED, That, in the event of grant of O'Kane's application, he shall divest himself of all interest in and sever all connections with station WFXV(TV), Utica, New York, prior to the commencement of program test authority.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.1221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in (a) the Standard Document Production Order (See Section 1.325(c)(1) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *on reconsideration*, FCC 91-154, paras. 7-8 & n.3, Appendix paras. 3 & 5, released May 15, 1991.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau